IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.2040 OF 2006

1.Mohd. Abu Kazi
2.Razak Abu Kazi
3.Rahiman Abu Kazi ...Applicants

vs.

1.Anandrao Sakharam Jadhav
2.State of Maharashtra ...Respondents

Mr.Ramesh Dube i/b M/s.Jay & Co. for the Applicants
Mr.A.S.Shitole,A.P.P. for State
Ms Deepali Y. Bhatekar for Respondent No.1

CORAM: A.S.OKA,J.
DATE OF HEARING OF LAST ARGUMENT : OCTOBER 11,2006
DATE OF PRONOUNCEMENT OF JUDGMENT: NOVEMBER 8,2006.

JUDGMENT:

1. By this Application under section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code of 1973), the Petitioner has taken exception to the order dated 21st November 2005 passed by the learned Judicial Magistrate First Class, Karad below Application at Exh.76 in Regular Criminal Case No.2968 of 1998. A Revision Application under section 397 of the said Code preferred by the Applicants for challenging the said order before the Sessions Court has been rejected.

2. The Applicants are being prosecuted at the instance of the second Respondent-State for offences punishable under sections 52 and 53 of the Maharashtra Regional Town Planning Act, 1966. A complaint was lodged at the instance of Karad Municipal

Council with the second Respondent alleging commission of offences under section 52 and 53 of the said Act of 1966 by the Applicants. An application was made by the first Respondent before the learned Judicial Magistrate First Class seeking permission to engage an Advocate to represent him. The first Respondent is the prosecution witness No.6 in the said case. The said application made by the first Respondent at Exh.76 was allowed by the learned Trial Judge by the order dated 21st November 2005 which is impugned in this Application. As stated earlier, Revision Application filed by the Applicants has been rejected by the Sessions Court.

3. The learned Counsel for the Applicants submitted that the first Respondent is one of the prosecution witnesses in the prosecution lodged at the instance of the second Respondent. He submitted that there is no provision in the said Code of 1973 under which the Trial Court can allow a witness to engage an Advocate. The learned Counsel for the first Respondent supported the impugned Judgment and Order. He invited my attention to the Affidavit-in-reply filed by the first Respondent. He submitted that the first Respondent lodged various complaints with Karad Municipal Council complaining about the illegal and unauthorised construction carried out by the Municipal Council. He submitted that as no action was taken by the said Council, a legal notice was issued by the first Respondent to the said Council. He submitted that only after repeated complaints were made by the first Respondent,

the Municipal Council acted and a notice was issued to the Applicants under sections 52 and 53 of the said Act of 1966. He pointed out that a Writ Petition was filed by the first Respondent in this Court seeking direction against the second Respondent herein (State of Maharashtra) to complete investigation against the Applicants. He submitted that the complaint was lodged by the Building Inspector of Karad Municipal Council only on the basis of the complaints filed by the first Respondent. He, therefore, submitted that the prosecution is at the instance of the first Respondent. He placed reliance on the decision of the Apex Court in case of Shiv Kumar Vs. Hukam Chand and another [(1999) 7 S.C.C. page 467]. He submitted that sub section 2 of the section 301 of the said Code will apply to the trial pending before the learned Judicial Magistrate First Class. He submitted that there is no error in the order passed by the Trial Court. He also pressed into service the decision of the learned Single Judge of Madras High Court in case of A.R.Balasubramanian Vs. V. Palani (1969 Cr.L.J. page 1297). The learned A.P.P. supported the impugned order.

4. I have considered the submissions. It appears that on behalf of Karad Municipal Council, one Shri Dilip Dixit an Inspector lodged a complaint on 12th May 1996 with Karad City Police Station alleging commission of offence as regards unauthorised construction carried out on the plot in question. On the basis of the said complaint filed at the instance of

Karad Municipal Council, investigation was carried out and a charge sheet was filed on 30th September 1998. It is an admitted position that the first Respondent has been cited as a prosecution witness. Thus, the complainant in the case is the Karad Municipal Council. It may be true that on the basis of various complaints filed by the first Respondent with the Karad Municipal Council, the said Council has acted upon by lodging the complaint with the police. It appears that the first Respondent all along complained about the unauthorised constructions allegedly carried out by the Applicants.

5. Perusal of the impugned order shows that the learned Judge has relied upon sub section 2 of section 302 of the said Code. It will be necessary to refer to sections 301 and 302 of the said Code which read thus :

301. Appearance by Public Prosecutor -

(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution,

and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor and may with the permission of the Court, submit written arguments after the evidence is closed in the case.

302. Permission to conduct prosecution -

(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

. Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation to the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.

6. Section 302 of the said Code of 1973 applies to the trial before the Court of a Magistrate. Sub section 1 provides that the Magistrate may permit the prosecution to be conducted by

any person other than a police officer below the rank of Inspector. Sub section 2 provides that such person who is permitted by the Magistrate to conduct prosecution may do so personally or by a pleader.

7. The operative part of the order passed by the Trial Court reads thus :

> "2. The learned Advocate Shri G.V.Patil is hereby granted permission to file a Vakalatnama on behalf of P.W.No.6 Jadhav."

8. It is obvious that the learned Judicial Magistrate First Class has not permitted the first Respondent to conduct the prosecution. The prosecution is being conducted by the Assistant Public Prosecutor as is clear from the impugned order. Sub section 2 of section 302 authorises the person who has been permitted to conduct the prosecution by a Magistrate to do so by appointing a pleader. As the first Respondent was not permitted by the learned Magistrate to conduct the prosecution by passing an order under sub section 1 of section 302, he continues only to be a prosecution witness No.6. The effect of the impugned order is that the first Respondent who is only a prosecution witness has been permitted to engage an Advocate. Sections 301 and 302 of said Code of 1973 have not conferred any power on learned Magistrate to permit a witness to engage an Advocate. In any case, under sub section 2 of

section 302 of the said Code of 1973, the impugned order could not have been passed by the learned Magistrate as there is no permission granted in favour of the first Respondent under sub section 1 of section 302.

9. In the case of Shiv Kumar (supra) the Appellant before the Apex Court was the first informant who had filed a report alleging commission of offence punishable under section 302 and section 120-B of the Indian Penal Code. The Appellant appointed an Advocate to appear for him in the trial before the Sessions Court. The Appellant was to be examined as a prosecution witness. An application was made by the Appellant praying for grant of permission to the Appellant for conducting the case under the directions of Public Prosecutor. The Sessions Court allowed the said application by allowing the Advocate for the Appellant to conduct prosecution under the supervision, guidance and control of the Public Prosecutor. The Sessions Court directed that while conducting the case, the Public Prosecutor shall retain with himself a control over the proceedings. The said order was challenged by the accused by filing a Revision Application before the High Court. The Revision Application was allowed and it was directed that the Advocate appointed shall act under the directions from the Public Prosecutor and may with the permission of the court submit written arguments after evidence is closed in the case. High Court directed the Public Prosecutor incharge of the case to conduct the case.

In paragraphs 8 and 9 of its decision the Apex Court held thus:

"8. It must be noted that the latter provision is intended only for Magistrate Courts. It enables the Magistrate to permit any person to conduct the prosecution. The only rider is that Magistrate cannot give such permission to a police officer below the rank of Inspector. Such person need not necessarily be a Public Prosecutor.

9. In the Magistrate's Court anybody (except a police officer below the rank of Inspector) can conduct prosecution, if the Magistrate permits him to do so. **Once the permission is granted the person concerned can appoint any counsel to conduct the prosecution on his behalf in the Magistrate's Court.**"

(Emphasis supplied)

The aforesaid observations will not help the Applicants as there is no order made by the learned Magistrate permitting the first Respondent to conduct the prosecution. While dealing with section 301 of the said Code of 1973, the Apex Court held thus :

"13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other

than the Public Prosecutor. the legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor."

10. The Apex Court held that the view taken by the High Court

was correct. Therefore, the decision in case of Shiv Kumar (supra) will not assist the Applicant in any manner. In case of A.R. Balasubramanian (supra) the learned Single Judge of the Madras High Court was considering the provisions of section 495 of the Code of Criminal Procedure, 1898 and in particular sub sections 1 and 3 thereof which are more or less similar to sub sections 1 and 2 of section 302 of the said Code of 1973. In the case before the Madras High Court, the Respondents were the Constituted Attorneys of the original complainants and the Respondents were also material witnesses in the case. An application was made by the Respondents. The learned Magistrate permitted the Respondents to conduct the prosecution as provided under sub section 1 of section 495 of the said Code of 1898 and permitted the Respondents to engage a pleader. While dealing with the Revision Application preferred by the accused persons, the learned Single Judge of Madras High Court held that any complainant, in any case is a material witness and on that count it cannot be said that the complainant cannot be allowed to conduct the prosecution. Madras High Court therefore upheld the order passed by the learned Magistrate. As stated earlier, the Respondents before the Madras High Court were Constituted Attorneys of the original complainant and they were specifically permitted to conduct the prosecution. In the present case, the Respondent is neither the complainant nor a Constituted Attorney of the complainant. The complainant is a statutory body viz. Karad Municipal Council. Therefore, it is doubtful whether the

learned Magistrate could have authorised the first Respondent to conduct the prosecution. As stated earlier, the learned Magistrate has never authorised the first Respondent to conduct the prosecution. By the impugned order, Shri G.V.Patil Advocate has been granted permission to file Vakalatnama on behalf of the first Respondent who is a prosecution witness No.6. The perusal of the impugned order passed by the trial Court does not show that the Court intended to grant permission to conduct prosecution as provided under sub section 1 of section 302 of the said Code of 1973 in favour of the first Respondent. Therefore, impugned order is illegal and deserves to be set aside.

11. Hence, the Application is disposed of by passing the following order :

i) Impugned order dated 21st November 2005 is quashed and set aside and the application at Exh.76 in Regular Criminal case No.2968 of 1998 stands rejected.

ii) All contentions of the parties in the pending case are expressly kept open.

JUDGE